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IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

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THE AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO EX REL. HENRY A. LINDSLEY, District Attorney of the Second Judicial District of the State of Colorado,
Defendant in Error.

No. 143.

Error to the Supreme Court of the State of Colorado.

BRIEF FOR PLAINTIFF IN ERROR.

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Solicitors of Plaintiff in Error.

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No. 449.

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THE AMERICAN SMELTING AND REFINING COMPANY, *Plaintiff in Error*, vs. THE PEOPLE OF THE STATE OF COLORADO EX REL. HENRY A. LINDSLEY, District Attorney of the Second Judicial District of the State of Colorado, *Defendant in Error.*	*Error to the Supreme Court of the State of Colorado.*

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

On April 4, 1899, The American Smelting and Refining Company was duly incorporated under the

laws of the State of New Jersey with a capital stock of sixty-five million dollars, which capitalization was, on April 8, 1901, increased to one hundred million dollars (Rec., p. 2). In both its original incorporation and the subsequent increase of its capital stock, said company fully complied with all the requirements of law and of the statutes of New Jersey, and was, by the terms of its charter, endowed with capacity to transact business not only within the limits of the State of New Jersey, but also in various other States of the United States, including Colorado, in the Republic of Mexico and elsewhere; (Rec., p. 9).

On April 28, 1899, the said company, in compliance with the Colorado statutes, filed its charter in the office of the Secretary of State for the State of Colorado, and in the offices of the recorders of the several counties of said State wherein it proposed to carry on its business; appointed an agent for the State of Colorado; located an office in said State; and in all other respects complied fully with the law and the statutes of Colorado, made and provided to authorize it to do business in said State as a foreign corporation: And on May 17, 1901, it further fully complied with the laws and statutes of Colorado relative to the amendment of its charter increasing its capitalization as aforesaid; (Rec., pp. 9-12, 23-25).

The Colorado statutes (S. L. 1897, p. 157) require a foreign corporation, before it should "be permitted to do any business" in said State, to pay to the Secretary of State, *for the use of the State*, the sum of ten dollars upon the first fifty thousand dollars of its capital stock, and for any capitalization "in excess of fifty thousand dollars * * *

the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock."

In compliance with this law, the plaintiff in error paid to the Secretary of State for the State of Colorado, on April 28, 1899, the sum of $9,792.50 upon its original capitalization, and on May 17, 1901, the further sum of $5,250.00 upon the increased capitalization; (Rec. pp. 9-10, 11); and thereupon, as required by law, said Secretary of State for the State of Colorado, issued to the plaintiff in error, on May 21, 1901, under the seal of the State, his certificate, certifying, (Rec., p. 12), "that said company has made full payment of all fees prescribed by law to be paid to the Secretary of State and due at the time of the issuance of this certificate, and is hereby authorized to exercise any corporate powers provided by law."

The corporate powers of a corporation, under the Colorado statutes, were, among other things, to "have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed, as named in their certificate of incorporation." (Colo. G. S., 1883, Sec. 244; 1 Mills' Ann. Stat., Sec. 476, p. 618).

The plaintiff in error thereupon immediately invested five million dollars in round numbers in Colorado property, (Rec., pp. 41, 48); and began to do a smelting and refining business in metalliferous ores in the State of Colorado. Only a small portion,—to-wit: not over twenty per cent., (Rec., pp. 41, 46)—of the property and business of the plaintiff in error was held or carried on in Colorado; and it was

at the same time carrying on a similar business in Utah, Idaho, Montana, California, New Jersey, South Dakota, New Mexico, Arizona, South America, Old Mexico and British Columbia; (Rec., pp. 39, 40, 43).

At this time the laws of Colorado, (G. S., 1883, Sec. 238), limited the life of such domestic corporations to twenty years; and further provided, (G. S., 1883, Sec. 260), that foreign corporations "shall be subject to all the liabilities, restrictions and duties imposed by law" upon Colorado corporations, "and shall have no other or greater powers:" And the Colorado Supreme Court has construed this statute as limiting the rights given to foreign corporations,—no matter what the limit of their life in their parent state,—to twenty years, unless renewed in Colorado by a new filing and a new payment as provided for extension of the life of domestic corporations.

Iron Silver M. Co. v. Cowie, 31 Colo. 450.

Prior to and at the dates above mentioned, the Colorado statutes imposed no charge, tax or fees upon foreign corporations for the right to do business in that State, other than as above mentioned.

Such was the condition of the law at the time that the plaintiff in error concluded to do business in the State of Colorado, paid over $15,000 to said State for the right so to do, invested five million dollars in Colorado property, and entered upon an extensive and expensive smelting and refining business in said State.

The pleadings of the defendant in error expressly

admit that, at the time that the plaintiff in error came into the State of Colorado to do business, and subsequently when it increased its capital stock, the company made payment to the Secretary of State "in full and strict compliance with each and every law and statute of the State of Colorado then existing, relating to doing business in the State of Colorado by foreign corporations"; (Rec., p. 25, fol. 56). By the pleadings it is further admitted that said company *then* complied with all the other laws, requirements and statutes of the State of Colorado relating to foreign corporations doing business in said State; and that at all subsequent times it continued to comply with all the laws and statutes of Colorado, except in the single particular out of which this controversy arose.

Some three years after the said company had entered the State of Colorado, purchased and paid for the right "to do business" therein, established an office there, made extensive investments as above stated, and fully complied with all the existing laws, the Colorado Legislature enacted a statute, approved March 22, 1902, (Colo. S. L. 1902, p. 43-160) which contained the following provisions:

> "Sec. 64. In addition to all other fees and taxes now provided for by law, every corporation which has heretofore obtained, or which shall hereafter obtain, a charter or certificate of incorporation from this State, and having a capital stock of $25,000.00 or over, shall pay, on or before the first day of May of each year, or at the time of obtaining such charter or certificate

of incorporation, and on or before the first day of May of each year thereafter, as the case may be, an annual State corporation license tax to the auditor of the State of Colorado, as follows:

"Two cents upon each one thousand dollars of its capital stock.

"Sec. 65. Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this state, pay annually, on or before the first day of May of each year, or at the time of obtaining such right or privilege, and on or before the first day of May of each year thereafter, as the case may be, to the auditor of the State of Colorado, a State license tax as follows:

"Four cents upon each one thousand dollars of its capital stock; provided, that in cases of foreign corporations the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares.

"Sec. 66. Every corporation which shall have failed to pay the tax provided for in Sections 64 and 65, shall by reason of such failure, forfeit its right to do business within the limits of this State until such tax

> is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporations, in any court of competent jurisdiction within the limits of this State, until such tax is paid."

It will be seen that these provisions (Sec. 65) assume, and are predicated upon the assumption and fact, that the "foreign corporations," affected by said Act, had obtained and were entitled to "the right and privilege to transact and carry on business within the State of Colorado."

Said Act provided, (Sec. 66), "that every corporation which shall fail to pay the tax provided for in sections 64 and 65 shall, by reason of such failure, forfeit its *right to do business* within the limits of this State until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges," etc.

The plaintiff in error failed and refused to pay the tax* imposed by the above quoted provisions of said statute; and thereupon the State instituted the present suit in *quo warranto*. After trial, the State district court made and entered a judgment which, after reciting the facts of such failure on the part of the plaintiff in error to pay the tax imposed by the Act of March 22, 1902, adjudged that the plaintiff in error "has forfeited its right to do business within

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* see NOTE, *infra*.

the limits of the State of Colorado until such tax is paid and is absolutely and wholly deprived of all rights and privileges within the State of Colorado until such tax is paid." (Rec., p. 50, fol. 108.)

From this judgment the plaintiff in error appealed to the Colorado Supreme Court, which affirmed the judgment of the court below. The present writ of error is prosecuted to secure in this Honorable Court a review and reversal of that judgment of the Colorado Supreme Court.

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*NOTE.—In the following argument the word "tax" will be used repeatedly to designate the exaction proposed and imposed by sections 64, 65 and 66 of the Colorado Act of March 22, 1902. To avoid the use of this word would in most cases involve more or less of circumlocution, which would result in an increased length of the brief without any corresponding benefit. At the very outset, therefore, we take occasion to say that the use of said word in this brief for the purpose indicated is not to be taken as an admission or concession that the exaction proposed and imposed by said statute is in any proper or legitimate sense a "tax" or license fee as these terms are ordinarily used and understood. The belief and contention of the plaintiff in error, at all times and under all circumstances in the present discussion, is that the exaction provided for in said statutory provisions is not in any sense properly a "tax" or "license fee," but that it is, as denominated by the Colorado Supreme Court, simply an ad-

ditional "bonus" or "conventional price" arbitrarily demanded by the State of Colorado from this foreign corporation for the privilege of continuing to exercise and enjoy its already vested and contract right to do business as a corporation in said State, "and as a condition precedent to its right to do *any* business within the limits of this State," (see, Sec. 65 of said Act) from and after the date of the Act.

Specification of Errors Relied Upon.

The errors relied upon on this review may be classified under the following general specifications, to-wit:

Specification I. The Colorado Act of March 2, 1902, and the judgment and decree of the State court upholding the constitutionality and validity of the aforesaid provisions of said Act, are in violation of Article I, Sec. 10, of the Federal Constitution prohibiting any State to "pass any * * * *ex post facto* law, or law impairing the obligation of contracts."

This specification primarily covers assignments 4, 7, 14, 32; and incidentally numerous other of said assignments specified below.

Specification II. The said statute, and the judgment and decree aforesaid upholding the same, are in violation of the Fourteenth Amendment to the Federal Constitution in that:

(a) They abridge the privileges and immunities of the plaintiff in error as a citizen of the United States and of one of the States thereof;

(b) They deprive the plaintiff in error of liberty or property, or both, without due process of law;

(c) They deny to the plaintiff in error the equal protection of the law.

This specification primarily covers assignments 1, 3, 5, 6; and also others which will be indicated *infra*.

Specification III. The said statute, and the judgment and decree aforesaid upholding the same, are in violation of Art. IV, Sec. 2, paragraph 1, of the Federal Constitution, in that they deprive the plaintiff in error of rights, privileges and immunities in the State of Colorado secured by the Federal Constitution and the laws of the United States to the plaintiff in error as a citizen of another State.

This specification covers assignments 2, 8, 9, 11, 12, 27, 28, 38 and 39.

Specification IV. Said statute, and the judgment and decree aforesaid, upholding the same, are in violation of the Fifth Amendment to the Federal Constitution, in that it deprives the plaintiff in error of "property, without due process of law," and assumes to "take private property" of said plaintiff in error "for public uses without just compensation."

This specification primarily covers assignments 3, 5, 21; and also other assignments indicated *infra*.

Specification V. Errors of the court below presented and pointed out by the following assignments of error, which might be properly classified

and will be discussed under one or more of the preceding specifications, as being in effect but to point out in detail and to particularize errors controlled by the same general principle or proposition, to-wit:

(a) Art. I, Sec. 10,—Assignments 15 to 20 inclusive, 23 to 26 inclusive, 33 to 39 inclusive;

(b) Fourteenth Amendment,—Assignments 10, 11, 12, 21, 26, 34, 35, 38 and 39;

(c) Fifth Amendment,—Assignments 26, 34, 35, 38 and 39;

Specification I.

Impairing the Obligation of Contracts.

Plaintiff in error contends that said provisions of the Colorado Act of March 22, 1902, and the judgment and decree of the Colorado court in the present case, violate the prohibition contained in the Federal Constitution against "impairing the obligation of contracts."

This prohibition is violated in two respects, to-wit:

(1) By the above quoted Sec. 65 of said Act, (Colo. S. L. 1902, p. 73), by which the State of Colorado undertakes to require the plaintiff in error to pay a new and additional consideration for contract rights for which it has already paid in full the consideration demanded and agreed upon by the State at the time the contract was entered into; by virtue of which the plaintiff in error became vested with the right "to do business" in the State of Colorado; and upon the faith of which it invested a large amount of its capital stock in real

property in said State, personal property for the equipment of its enterprise in that State and expenses for carrying on its business therein.

(2) This prohibition of the Federal Constitution is also violated by the same Act, and by the judgment and decree aforesaid upholding the constitutionality and validity of said Act, whereby the plaintiff in error is deprived of any and all remedy or remedies for the enforcement and protection of said contract, and any and all other contracts which may be entered into by or with it for the furtherance of the enterprise which it is entitled to prosecute in the State of Colorado under its initial contract with said State itself. The discussion of this "(2)" proposition is identical with, and therefore will be referred to, a later specification, under which will be discussed the denial of "due process of law," and of the "equal protection of the laws."

At the outset of the (1) proposition it seems advisable to exactly define and limit the contention upon which the plaintiff in error, upon this point, relies. We do not contend that the contract with the State of Colorado, by which the plaintiff in error obtained the right *to do business* in the State of Colorado, exempts the plaintiff in error from any legitimate tax or imposition which the State of Colorado was entitled to impose upon *property*, real, personal or mixed, tangible or intangible, and whether by a direct revenue tax or by an occupation tax which the State of Colorado was authorized by law to impose upon its own citizens or other persons owning property or doing business in that State. We do not claim for plaintiff in error any *exemption* from taxation which the State of Colorado was entitled to im-

pose upon any parties, personal or corporate, within her borders. Our sole contention is that, having, by the initial contract, conferred upon the plaintiff in error the right "to do business" within her borders, and having fixed and received the consideration agreed upon by that contract, said State cannot now violate, impair or alter said contract to the extent of demanding and collecting a new and additional consideration and compensation for a right already granted and paid for.

Neither does the plaintiff in error deny that, in the first instance, it was within the right and power of the State of Colorado to either withhold from foreign corporations altogether the right and privilege to do business within her borders; or, if she chose to admit them, to charge any price she might choose to fix for the granting of that right and privilege. The law seems to be that the State of Colorado, arbitrarily and at her own election, might exclude foreign corporations altogether; or, if she chose to admit them, might arbitrarily charge whatever price or consideration she pleased for the granting of such right. The State of Colorado exercised her election in this matter and determined to grant to foreign corporations the right to do business within her borders upon the payment of a consideration which she arbitrarily fixed and which foreign corporations desiring to operate in this State were compelled to pay, or to remain outside. Determined by the standard fixed by the State of Colorado, the price, which the plaintiff in error was required to pay for "the right to do business" in said State, was fixed by the Colorado statutes, existing at the time the contract was made, at the sum of $15,000. It

was within the right and power of said State to have fixed this price at any sum she chose, whether fifteen cents or fifteen million dollars, or less or more than either. When the plaintiff in error took under consideration the question of doing business in the State of Colorado, it naturally and necessarily took into consideration and gave controlling influence to the question of whether it could afford, or was willing to pay the price then placed upon that right and privilege. After due consideration the plaintiff in error determined that it would pay the price then demanded. It is evident that it considered the right worth $15,000, from the fact that it was willing to, *and did*, pay that amount therefor: But it cannot be said that, had the price been then fixed—as the Act under consideration attempts to do,—at the price of $95,000 ($15,000 cash and $4,000 annually for twenty years), the plaintiff in error would not have hesitated to enter into the contract; more than probable it would have considered that the privilege and right to do business in the State of Colorado was not worth any such amount. At any rate, when the agreed consideration of $15,000 was paid for the contract right and the contract fully executed by one party thereto (the plaintiff in error), any law, judgment or decree which subsequently required the payment of an additional consideration of $80,000, or any other amount, for the same contract right, is clearly in violation of the prohibitions contained in the Constitution of the United States.

Section 65 of the Act provides:

> "Every foreign corporation" (which includes the plaintiff in error), "which has

heretofore obtained * * * the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, as a condition precedent to its right to do any business within the limits of this State, pay, annually * * * four cents upon each one thousand dollars of its capital stock."

And Sec. 66 of said Act provides that:

"Every corporation which shall have failed to pay the tax provided for in sections 64 and 65, shall, by reason of such failure, forfeit its right to do business within the limits of this State until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporation, in any court of competent jurisdiction within the limits of this State, until such tax is paid."

These provisions of said Act violate both the Federal Constitution and the Constitution of the State of Colorado.

Paragraph 1 of Sec. X of Art. 1 of the Federal Constitution provides:

"1. No State shall * * * pass any bill of attainder, *ex post facto* law, or law

impairing the obligation of contracts or grant any title of nobility."

This provision of the Federal Constitution is reproduced in the Colorado Constitution, (Sec. 11 of Art. II), which is as follows:

> "That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, * * * shall be passed by the general assembly."

Prior to the passage of this Act of March 22, 1902, the State of Colorado had entered into a contract with the appellant as shown by the allegations of the complaint, the evidence introduced at the trial, and the Colorado corporation laws applicable to the facts and conditions of this particular case. See "Statement of the Case," *supra*.

The pleadings and the evidence herein show that on and prior to May, 1901, the appellant had complied with all the then existing laws of the State of Colorado; and by virtue of such compliance it had become permitted, authorized and empowered to own property and do business in the State of Colorado, and to carry out, in said State and under the laws thereof, all the purposes of its creation as stated in its charter of incorporation. Under said laws, and as a condition precedent to such authority to the appellant to do business in this State, it paid for that privilege the sum of $15,042.50, being a fee based upon its entire capitalization.

This was "a consideration," *charged by the State and paid by the plaintiff in error to the State*, for the privilege of *doing business* in Colorado. The

statute at that time did not provide for any further consideration to be paid for the privilege aforesaid. No agreement was made nor right reserved for subsequently charging of an additional consideration payable annually or otherwise. There was no statute at that time providing for the payment of an annual license tax, nor did the statutes put any limitation upon the privilege of carrying on, in the State of Colorado, the business for which said corporation was organized, as shown by its articles of incorporation;—except a limitation as to time, as to which the Supreme Court of Colorado has recently held that the period for which a foreign corporation has *the right to do business* in this State—whatever the life of that corporation under the laws of the State of its origin,—is limited to the statutory life of corporations created under the laws of Colorado, to-wit: twenty years.

Iron Silver M. Co. v. Cowie, 31 Colo. 450.

The plaintiff in error, by such payment and compliance with existing law, obtained the right, by grant from the State, made for valuable consideration, to do business in this State for a period of twenty years; subject, of course, to the ordinary rules as to taxation of its *property* equally with that of any other person within the jurisdiction of the State. The right, so granted, cannot be taken away by the imposition of a subsequent additional burden, *as a condition* to the "doing of business" in this State. Relying upon the grant made to it under the laws of the State, and for which it had paid the sum of $15,000, it invests capital, acquires property, establishes a business, and has definite

vested rights which cannot thereafter be taken away by the imposition of new conditions.

Commissioners v. Colo. Seminary, 12 Colo. 497, 499.

"The obligation of the contract, implied in the grant of a corporate charter will be impaired by a law, passed subsequent to the acceptance of the charter, annulling the corporation, that is, taking its charter life; taking away any of the franchises conferred by the charter; *imposing burdens on the corporation itself as a condition to the further exercise of its corporate rights;* or imposing additional burdens on corporate stockholders either as to business before or afterwards transacted."

15 A. M. & Eng. Ency. Law. (2nd. Ed.) p. 1049.

"An act of incorporation, authorizing the building of a toll bridge across a navigable river, 'with two suitable draws which shall be at least thirty feet wide,' constitutes, when accepted, a contract between the Commonwealth and the corporation, which cannot be affected by a subsequent act, requiring the corporation to maintain draws of a greater width."

Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray, 339.

Washington Bridge Co. v. State, 18 Conn. 53.

Monongahela Nav. Co. v. Coon., 6 Pa. St. 379.

"The laws, which exist at the time of the making a contract and in the place where it is made and to be performed, enter into and make part of it. This embraces those laws alike which affect its validity, construction, discharge, and enforcement. The *remedy*, or means of enforcing a contract, is a part of that 'obligation' of a contract, which the Constitution protects against being impaired by any law passed by a State."

Walker v. Whitehead, 16 Wall. 314.

"The obligation of a contract depends upon its terms and the means which the law, *in existence at the time*, affords for its enforcement. A law, which alters the terms of a contract by imposing new conditions or dispensing with those expressed, is a law which impairs its obligations."

State Tax on Foreign-held Bonds, 15 Wall. 300, 320.

"Corporate franchises, granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, and the grant, under such circumstances, if it be absolute in its terms, and and without any condition or reservation, importing a different intent, becomes a contract within the protection of that clause of

> the Constitution which ordains that no State shall pass any law impairing the obligation of contracts."
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> *Miller v. The State*, 15 Wall. 478, 488.

It is a matter frequently suggested in decision and discussion, that the right of a foreign corporation to do business in a State other than that of its origin, is a mere matter of "comity." That is perhaps true when no consideration is charged for the privilege, and it is exercised and enjoyed by the mere acquiescence and *tacit* permission of the State: But it ceases to be a mere matter of *comity* when made a matter of express statute and becomes a matter of *contract* when a consideration was demanded and received for extending to foreign corporations the "right to do business" within this State. That is not enjoyed by "comity" which is conferred by statute and *paid for* at a high price.

The reasoning of the Supreme Court of the United States in the case of *Gordon v. Appeal Tax Court*, 3 How. 133, illustrates the effect of the payment of a consideration for the privilege of doing business or of being a corporation. While in that case there were two elements, one the payment of a *bonus*, and the other the agreement of an exemption from certain taxes, yet the argument on the two parts of the proposition are separate. The banks in that case upon their organization paid a *bonus* for their franchises. The Court said (pp. 145-6):

> "A round sum, or an annual charge, with or without reference to capital stock, may be asked by a legislature for such a

franchise. It may be more convenient to the banks to have such a consideration or *bonus* distributed through the years of their corporate existence, than to pay its equivalent in advance. This option was given to the old banks. Being so given, it is conclusive that the legislature intended the annual tax or charge upon the capital stocks of the banks to be the *bonus* or price, or part of the price as to some of them, that they were to pay for the prolongation of their franchise of banking. When the banks accepted the acts, by choosing to pay the annual charge instead of the stipulated alternative, it is plain that they thought so too, and that they understood in that way *the contract* between themselves and the State. Either was a condition, to be accepted and complied with before the charters were to be extended. Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax *upon the franchise*. But why, when bought, as it becomes property, may it not be taxed as land is taxed which has been bought from the State?—was repeatedly asked in the course of the argument. The reason is, that everyone buys land, subject, in his own apprehension, to the great law of necessity that we must contribute from it and all of our property something to maintain the State. But a *franchise* for banking, when bought, the price is paid for the use of the privilege

whilst it lasts, and *any tax* upon it would substantially be *an addition to the price*."

Whether the tax (?) assessed by the revenue law of 1902, "in addition to all other fees and taxes," shall be considered as a tax upon franchises or a tax upon other property, its payment is, by the letter of the law, made a condition to the continuing "to do business;" it is therefore a distinct imposition of an additional burden upon the "right to do business," which right to do business was "bought" and paid for at the time the corporation was admitted to the State; and, at the time that payment was made, the only limitation was that the period, for which the right was granted, was to be limited to twenty years. To charge now an additional sum for the right, already paid for, to do business in Colorado, would certainly impair the contract which the State made when it accepted a specified and valuable consideration for the right which it granted.

The point is discussed in the case of *Wendover v. City of Lexington*, 15 B. Monroe, 258, 264, where the court, after quoting the *Gordon case* above mentioned, says:

> "It is decided in that case that a franchise is not taxable as such, if a price has been paid for it which the legislature accepted. And that is our own opinion. If at the time of the grant of a franchise, a price is stipulated and paid for it, there is an agreement or contract made which the legislature thereafter would have no right to impair, for she is expressly prohibited by

the constitution from passing any law impairing the obligation of contracts."

The proposition is very clearly expressed in the discussion contained in the case of *Attorney General v. Bank of Charlotte*, 4 Jones' Equity, (N. C.) 287, 293. That case was almost on all fours with the case now under discussion, and the court says:

> "It is now universally conceded that a grant by the Legislature of a charter, whereby a banking corporation is created, is a contract between the State and the corporation, which the Constitution of the United States prohibits the State from violating. The well known definition of a contract is, that it is an agreement between two or more persons, upon a sufficient consideration, to do, or not to do some particular thing. An analysis of it will show that it consists of four essential parts, to-wit, the parties, the agreement express or implied, the *consideration*, and the thing to be done or omitted. Of these, the consideration is as important as any other, *and cannot be varied by either party without the consent of the other;* and an attempt to do so by either party without such consent, would be a violation of the contract, as effectually as would be the breach of it in any other particular. The legislature has the undoubted right to grant to a number of individuals the franchise of being a corporation, for the purpose of banking or for any other useful purpose.

If the grant be mainly for the benefit of the corporators themselves, the State may demand a price for the franchise, to be paid at once, in a round sum, or annually, during the existence of the corporation, by way of impost or tax. Where the grant of the charter is tendered by the State, and accepted by the individual persons to whom it is offered, then, the corporation springs into existence, and at the same moment a contract arises between it and the State, which is protected by the Constitution of the United States. If the price or consideration of this contract is stated, in express terms, to be a certain sum, *and no more*, there can be no doubt that the State would be prohibited by the Constitution of the United States from demanding anything more for the corporate franchise. Can it make any difference in principle whether words excluding any addition to the price be used or not? When a person says that he will take one thousand dollars for a tract of land, does he not necessarily mean that he will take that sum, and that he will not ask any more, and, if the offer is accepted, can he demand any more? No one can hesitate as to the proper answer to be given to this question; and the purchase of a franchise from the State, when viewed in the light of an executed contract, is precisely analagous. And accordingly, the Supreme Court of the United States held, in the case of *Gordon v. Appeal Tax Court*, cited by the defendant's

counsel, that a stipulated price for the extension by the legislature, of a bank charter, without any words of restriction or limitation being used, did exhaust the power of taxation on the franchise during the period of the extension. * * * A franchise, unlike land or a personal chattel, has no existence until it is called into being by the act of the legislature or sovereign power of the State, and in the very act of granting it to a corporation, created for the very purpose of taking it, a contract is formed between the State and the corporation. An essential part of this contract is, as we have already shown, the consideration or price, paid or agreed to be paid, for the franchise, and that neither party is at liberty to vary without the consent of the other. And this prohibition must continue *during the existence of the franchise*, because the contract including the consideration, is an essential part of it and must be co-existent with it."

Every line of this reasoning applies to the case at bar. The plaintiff in error could not come into Colorado and do business, except upon *paying a consideration*. It paid a cash consideration in the lump sum of $15,000; and under existing law, that payment gave it the *privilege and right to do business* in Colorado for a period of twenty years. The proposition was made by the State; was accepted by the plaintiff in error; the price was paid; the contract was executed; the plaintiff in error entered into busi-

ness there upon faith of the contract; acquired property and incurred large expenses under it; *and that* contract cannot now be varied or impaired by the State, in violation of the constitutional prohibitions.

This is an entirely distinct proposition from the question of revenue taxes based upon property values for the general support of the government. As to such taxes, of course, the uniformity rule applies, and every person must bear his proportionate share, *but only such share*, of the general burden. But as its purpose and effect is to exact a price or consideration for the right *to do business*, this legislation is an attempt to alter and impair an existing contract by charging a second time for a thing that has been already once paid for, at the full price mutually agreed upon by the parties to the bargain; it is, therefore, in violation of the obligation of contract, and as such it is void.

The constitutional reserved power as to corporations will not support this legislation. This reserved power is expressed in the Colorado Constitution thus:

> "The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revokable at the adoption of this Constitution, or any that may hereafter be created, *whenever, in their opinion it may be injurious to the citizens of the State*, in such manner, however, *that no injustice shall be done to the corporators.*"
>
> Constitution of Colorado, Article XV, Sec. 3.

Admitting for the sake of argument only, that this constitutional provision would reach foreign corporations and involve a reserved power to revoke or annul a privilege to do business granted to such foreign corporation by Colorado laws,—yet, we respectfully submit, that it would not apply to a case where the privilege had been *bought and paid for*. In such a case, even under this reversed power, the right, which had thus been bought and paid for, could be taken away only for some breach on the part of the grantee of its duties or obligations under the grant, *e. g.*, an abuse of its corporate privileges; and this would of course, have to be established by some judicial proceeding showing a misuser whereby it had forfeited the right which had been granted to it. The State having made a contract, for a valuable consideration, cannot repudiate its contract arbitrarily under any such reserved power.

But it must be noted that this reserved power is expressly limited. It is only when the continued existence of the charter, or the continued transaction of the corporate business, is, in the opinion of the legislature, "*injurious to the citizens of the State*" that the reserved power could be exercised. And there can be no pretense that that is a ground for the action in this case.

There is a further limitation, also, that, when there is any such revocation or annulling of the grant, it must be done in such a way that "*no injustice shall be done to the corporators.*" But can an additional compensation for a privilege, already paid for at an agreed price, be imposed without injustice? Does it not come under the same principles as the case of a sale of land, as suggested in the

North Carolina decision, in a case above quoted? The sale is made for an agreed price. The offer is accepted, the price paid, possession is given. Would it not be an injustice, through arbitrary power, to demand an additional price for the same privilege,—for the same interest,—previously conveyed?

In *Miller v. State*, 15 Wall, 478, 497-8, the U. S. Supreme Court said:

> "So where the legislature in granting a charter to an insurance company reserved the right to alter it. * * * Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporation, etc."

In *Coast Line R. Co. v. Savannah*, 30 Fed. 646, the court said (649-50):

> "In construing this contract, it is the necessary presumption that the railroad company agreed, in consideration of the privileges granted it by the city, to pave between its tracks and no more; and this obligation is as binding on the city as it is on the company. Therefore a subsequent act of the legislature, requiring it to pave a lateral addition of six feet bears on the contract to the advantage of the city and to

the injury of the company, and impairs the obligation."

"It remains to be determined whether the act of the State legislature and the city ordinance in pursuance thereof, are valid. Fortunately for the proper adjudication of this most interesting question; the reports of the highest appellate tribunal of our country, a tribunal at once renowned for the majesty of its jurisdiction, the enlarged and splendid comprehensiveness of its knowledge, and the perspicuous lucidness of statement with which its decisions are pronounced, abound in cases upon the provision of the constitution by which the validity of this act must be tested. The power of the State to repeal, suspend, alter or modify a charter is fully conceded in repeated decisions. Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger; but neither the State nor the United States can interfere with private rights, except for legitimate governmental purposes; and it is not legitimate for any purpose for a State to pass any law impairing the obligation of a contract. The reservation of the State to withdraw the franchise of this railroad cannot be disputed, and that reservation affects the entire relation between the State and the corporation, and places under legislative

> control all rights, privileges and immunities 'derived by its charter direct from the State.' 15 Wall. 458. But rights and interests acquired by the company, not constituting a part of the contract of incorporation, stand upon a different footing. 96 U. S. 511. It is competent for the State, in the exercise of its reserved power, * * * to alter the act incorporating the company in all particulars constituting the grant to it of corporate rights, privileges and immunities. These flow from the State, and should properly be kept under its control. But where the corporation has, by contract or otherwise, acquired vested rights, it is not competent for the legislature to take them away. The State cannot undo what has already been done. It cannot unmake contracts that have already been made. All such rights of the corporation, legally acquired, are equally beyond legislative interferences. (Citations.)"

Erie R. R. Co. v. Penna., 153 U. S. 628, is a case quite similar in principle to the one at bar, and pertinent and persuasive; but to avoid quite a lengthy quotation, we beg to adopt by reference as a part of this brief, that portion of the court's opinion beginning with the last paragraph on page 642, and ending with page 644.

It seems to us that upon questions of this character, there can be no controversy, and that whatever view may be taken of the other contentions presented to this Court, the sections of the Act of

March 22, 1902, above quoted, are void for the reason that their effect is to "impair the obligation of a contract," and thus to conflict with Art. I, Sec. 10, of the Federal Constitution.

For an intelligent, correct and just determination of this controversy, it is of the utmost importance to clearly understand and constantly bear in mind what is the exact thing granted,—the exact right or privilege contracted for by and between the State of Colorado and the plaintiff in error, authorizing the latter, as a foreign corporation, to do business in said State.

A corporation, being an artificial person created and brought into being by statute, it can only be created and exist by virtue of express law. *To be a corporation* is not a natural right, and as the right can only exist pursuant to express grant, or a law having the legal effect of a grant, the law-making power of the jurisdiction in which the creation or existence of a corporation is sought, has absolute and arbitrary control over the method by which the corporation shall come into existence, and over the price which shall be charged for that privilege. The authoritities are numerous to the effect that two initial privileges or powers—called franchises by the authorities—are essential to the creation and existence of a corporation, to-wit: 1. The franchise "to be a corporation;" and, 2, the franchise "to do business as a corporation" in the State or jurisdiction creating the corporation

In the case of a domestic corporation these two franchises are granted simultaneously, and the price charged therefor covers both franchises: Both to-

gether might, then, be considerd as being, for all intents and purposes, one and the same.

When, however, a corporation, created by one State, seeks to do business in another State, these two franchises are necessarily separated. The second State can charge the foreign corporation nothing for the franchise "to be a corporation;" for that franchise is already possessed by the corporation under the law of the State of its creation. But that law does not and cannot authorize the person or creature, which it has brought into existence, to do business in another State; consequently, its grant of such franchise to the corporation is limited by the boundaries of the parent State. When, therefore, such a corporation desires to do business in another State, it must obtain from the latter a franchise "to do business as a corporation" therein; and must pay therefor whatever price the second State chooses to demand for such privilege.

It is thus apparent that what the plaintiff in error contracted for with the State of Colorado, and paid for to the State of Colorado at the price of $15,000.00, was and is the right *to do business as a corporation* in that State. This is clearly recognized in the opinion of the Colorado Supreme Court deciding the case at bar. It is there said (Rec., p. 60):

> "The fee paid to the secretary of state for the use of the state when the certificate is filed is not, in any sense, a tax. It is a conventional price, or bonus, which the corporation pays to the state for the privilege of entering this state to do business as a corporation, subject to all legiti-

> mate taxation which the state may impose upon the property that it may acquire in the exercise of its franchise rights, and upon the use of the privileges thus purchased. The right or privilege *to be* a corporation is a franchise itself, often called a primary franchise; and while it was not this franchise which appellant obtained by the payment of the filing fee, because that had already been granted by the State of New Jersey, yet it was for the right to come into this state, and do business, as a corporation, that the bonus was exacted. The secondary franchise or right of making use of the purchased privilege, which the books denominate the franchise *to do*, is entirely distinct and separate from the franchise *to be* or to exist here as a corporation."

And later on (Rec., p. 60, fol. 131), the Colorado Supreme Court says:

> "We have already held that this filing fee was the conventional price for appellant's right of entrance, as a corporation, and when paid merely entitles it to come into this state *to do business as a corporation*, etc."

Thus it appears from the language of the Colorado Supreme Court itself, that the right or thing for which the plaintiff in error paid the sum of $15,000.00, "for the use of the state" of Colorado, was the right *to do business as a corporation* in the State of Colorado.

The provisions of the Act of March 22, 1902, repeatedly quoted above, clearly demands, and proposes to collect, another "bonus or price" for the same identical thing, to-wit, the right to do business in the State of Colorado. This statute does not purport to impose a tax upon *the* smelting and refining business, or upon any other particular business. It does not at all purport to tax *a* business. It expressly places the imposition upon the right *to do business as a corporation* and provides for a forfeiture of that right upon the refusal or failure of the plaintiff in error to pay the additional price demanded for a continued enjoyment of the right to do business as a corporation in the State of Colorado—a right which, as already repeatedly pointed out, had previously become vested in the plaintiff in error by virtue of an express grant, an executed contract, made for a valuable consideration mutually agreed upon by and between the parties, and paid by the plaintiff in error.

There is not the slightest difference in character between the imposition made upon the plaintiff in error by the Colorado statute under which the plaintiff in error paid to the Secretary of State, for the use of the State, the sum of $15,000.00 for the right to do business in the State of Colorado, and the imposition attempted by the aforesaid provisions of the Act of March 22, 1902. If the first was not a tax, then the second is not a tax. If the first was a mere bonus or conventional price or fee, then so is the second.

As the statutes existing at the time a contract is made, enter into and become a part of that contract,

it is undoubtedly true that foreign corporations coming into the State *after* the enactment and approval of the Act of 1902, must pay not only the initial charge, bonus or conventional price required by the previous Colorado statutes, but also the additional price in annual installments provided for by said Act. But where a corporation came, as did the plaintiff in error, into the State and acquired and paid for the contract right to do business therein, prior to the Act of 1902, and at a time when the sole and only charge or price fixed and demanded by the State, was the sum of $15,000.00, such a corporation cannot be required to pay an additional price for the same thing, even though the State of Colorado subsequently increased the price which it would demand for a similar commodity in all future sales thereof.

Specifications II & IV.

Due Process of Law.

Sec. 66 of the Act, under consideration, provides that—

> "Every corporation which shall have failed to pay the tax provided for * * * shall by reason of such failure *forfeit* its right to do business within the limits of this State until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, etc."

By reason of this provision, we contend that said Act is invalid and void. It violates the pro-

visions of the Colorado Constitution and the Federal Constitution respectively.

The Federal Constitution, in the 5th Amendment, declares:

> "No person shall * * * be deprived of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And the 14th Amendment of the same instrument provides:

> "1. No State shall * * * deprive any person of life, liberty or property, without due process of law."

This constitutional prohibition is embodied in Colorado's Constitution; (Art. 2, Sec. 25).

That the rights and privileges which the plaintiff in error enjoys under its charter of incorporation, and which, at the time of its coming into Colorado, that State by statute agreed and guaranteed that it should enjoy in said State upon payment of the consideration fixed by law, and its compliance with the other provisions of the Colorado law, are *property* within the meaning of these constitutional provisions, is too well settled to require argument or citation of authority. The effect of the statute under consideration is in two respects to deprive the plaintiff in error of its property without due process of law, to-wit:

First. It deprives the plaintiff in error of the right and opportunity to protect itself against the State by appeal to the courts and to "due process of law." Upon its failure to pay the exaction thus arbitrarily imposed upon it, no matter how unlawful, unjust or iniquitous that exaction may be, the plaintiff in error is absolutely deprived of the right to resort to the courts of the State for the purpose of testing the legality and justice of that tax; and by said statute the courts of the State are deprived of any jurisdiction of such a case the instant that it is made to appear therein that the corporate litigant has failed to pay the tax imposed.

Second. This statute absolutely deprives the plaintiff in error of the power to protect itself against unjust claims, demands and suits by other parties against it, and renders it powerless to enforce its just rights and demands against others. A more extraordinary situation cannot be imagined, nor one which is more fundamentally and outrageously at variance with every principle of law, justice, civil government, and civilization.

It is now well settled that a corporation is a "person" within the meaning of the constitutional provisions last above quoted. It is also well established that these constitutional prohibitions reach the unlawful imposition of illegal taxes.

This question, with several other kindred ones, was very elaborately and ably discussed by Mr. Justice Field and Sawyer J. in *County of Santa Clara v. So. Pac. R. Co.*, 18 Fed. 385, in the course of which case the former said:

(p. 397) "The first section of the Fourteenth

Amendment places a limit upon all the powers of the State, including, among others, that of taxation. After stating that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside, it declares that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person (dropping the designation 'citizen') of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' The amendment was adopted soon after the close of the civil war, and undoubtedly had its origin in a purpose to secure the newly-made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color, within the jurisdiction of the States throughout the broad domain of the republic."

(p. 398) "With the adoption of the amendment the power of the States to oppress any one under any pretense or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life,

to liberty, to property and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. * * * "

(p. 399) "Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and in effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result."

(p. 400) " * * * That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute *only his just proportion* to the general fund. When such exaction is made without reference to a common ratio, it is not a tax, whatever else it may be termed; it is rather a forced contribution, amounting, in fact, to simple confiscation."

(p. 403) " * * * It is impossible to conceive of a corporation suffering an injury or reaping a benefit except through its members. The legal entity, the metaphysical being, that is called a corporation, cannot feel either. So, therefore, whenever a provision of the constitution or of a law guarantees to persons protection in their property, or affords to them the means for their protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations."

(p. 404) "The Fifth Amendment to the Constitution declares that no person shall 'be deprived of life, liberty, or property without due process of law.' This is a limitation upon the federal government similar to that which exists in the constitutions of several of the States against their own legislative bodies; and the term 'person' thus used has always been held, either by tacit assent or express adjudication, whenever the question has arisen, to extend, so far as property is concerned, to corporations, because to protect them from spoliation is to protect the corporators also.

"Now, the Fourteenth Amendment extends in this respect the same prohibition to the States that the Fifth Amendment did to the federal government: 'Nor shall any State deprive any person of life, liberty, or property without due process of law;' and it adds to the inhibition, 'nor deny to any per-

son within its jurisdiction the equal protection of the laws.' By every canon of construction known to the jurisprudence of the country, the same meaning must be given to the term 'person' in the latter provisions as the former. Surely these great constitutional provisions, which have been, not inaptly, termed a new Magna Charta, cannot be made to read as counsel contend, 'nor shall any State deprive any person of life, liberty or property without due process of law, *unless he be associated with others in a corporation*, nor deny to any person within its jurisdiction the equal protection of the laws, *unless he be a member of a corporation*.' How petty and narrow would provisions thus limited appear in the fundamental law of a great people!

"The constitutional guaranties of due process of law, and of equality before the law, would be dwarfed into comparative insignificance, and almost emasculated of their protective force, if restricted in their meaning and operation as contended by counsel. A large proportion of our people are members of some corporation,—religious, educational, scientific, trading, manufacturing or commercial,—and the amount of property held by them embraces the greater part of the wealth of the country."

(p. 406) "The doctrine of unlimited power of the State over corporations, their franchises and property, simply because they are

created by the State, so frequently and positively affirmed by counsel, has no foundation whatever in the law of the country. By the decision of the Supreme court of the United States in the *Dartmouth College Case* it was settled, after great consideration, that the charter of a corporation, under which its franchise,—its capacity to do business and hold property,—is conferred, is a contract between the corporators and the State, and therefore within the protection of the federal constitution prohibiting legislation impairing the obligation of contracts. So far from the State having unlimited control over the franchises and property of corporations, because of its paternity to them, it has under that decision only such as it possesses over the contracts and property of individuals. It cannot, from that fact alone, alter, lessen, or revoke their franchises, although they be a free gift. It cannot, from that fact alone, interfere with or impose any burdens upon their property, except as it can interfere with and impose burdens upon the property of individuals.

" * * * To avoid that limitation upon their power, most of the States, in charters since granted, have reserved a right to repeal, amend, or alter them, or have inserted in their constitution clauses reserving a right to their legislatures to repeal, alter or amend the charters, or to repeal, alter or amend general laws under which corporations are permitted to be

formed. This reservation, in whatever form expressed, *applies only to the contract of incorporation*, without which it would be beyond revocation or change by the State. It removes any impediment, which would otherwise exist, to legislation affecting that contract. * * * It accomplishes nothing more; therefore, the legislation authorized by it must relate to *the contract embodied in the charter*, amending, altering or abrogating its provisions. Legislation touching any other subject is not affected by it,—neither authorized nor forbidden. Its whole scope and purpose is to enable the State to pass laws with respect to the charter,—the contract of incorporation,—which would otherwise be in conflict with the prohibition of the federal constitution. Legislation dealing with the corporation in any other particular must, therefore, depend for its validity upon the same conditions which determine the validity of like legislation affecting natural persons."

The exaction sought to be imposed in the above case was held in violation of the constitutional provisions last above quoted.

Denial of the Due Administration of Justice.

The Act which we are discussing provides (Sec. 66) that when a corporation shall fail to pay the tax provided for,

"such failure may be pleaded and maintained as an absolute defense to any and all actions,

> suits or proceedings in law or in equity, brought or maintained by or on behalf of such corporation in any court of competent jurisdiction within the limits of this State until such tax is paid."

By this provision, the Colorado legislature attempts to deprive any corporation, which fails to submit without protest to this exaction, of all resort to, or protection by, the Colorado courts, whether State or federal. It denies to such corporation the right to submit the justice of its cause to the courts, whether it be plaintiff or defendant. In this respect the Act is in direct violation of the following constitutional provision, to-wit:

The Fourteenth Amendment of the Federal Constitution, which, in paragraph 1, provides:

> "No State shall * * * deny any person within its jurisdiction the equal protection of the laws."

And Sec. 6, Article II, of the Colorado Constitution, which provides:

> "That courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and that right and justice should be administered without sale, denial or delay."

The answer, that will undoubtedly be made to this contention,—as it is the only answer which would be even plausible,—will be that this Act does

not deprive the corporations affected of any *right*, but only takes away the *remedy*, by which said right is to be enforced or protected; and that the power of the State over *remedies* is unlimited. We submit, however, that such is not the law, and that, whatever may be the power of the law-making department of the government over *remedies*, that power is undoubtedly subject to the limitation that there *must always be provided an adequate, appropriate and reasonably prompt remedy* for the enforcement and protection of every right.

> "The obligation of a contract consists of the duty imposed by the law on the parties to perform their agreement."
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> *15 Am. & Eng. Ency. Law*, (2nd Ed.) 1040.
>
> *Sturges v. Crowninshield*, 4 Wheat. 122, 197.
>
> *Green v. Biddle*, 8 *id.* 1, 75-6.
>
> *Ogden v. Saunders*, 12 *id.* 213, 256-7.
>
> *Bronson v. Kinzie*, 1 How. 311, 315 *et seq.*
>
> *McCracken v. Hayward*, 2 How. 608, 612.
>
> *Edwards v. Kearzie*, 96 U. S. 595, 600.
>
> *Lapsley v. Brashears*, 4 Litt. (Ky.) 46, 54.

> "This obligation the law enforces through its remedies."
>
> *15 Am. & Eng. Ency. of Law*, (2nd Ed.) 1040.

The *validity*, *construction* and *remedy* are part of the obligation.

Green v. Biddle, *supra*.
Ogden v. Saunders, *supra*.
Bronson v. Kinzie, *supra*.
McCracken v. Hayward, *supra*.
Von Hoffman v. Quincy, 4 Wall. 535, 550, *et seq*.
People v. Bond, 10 Cal. 563, 570.
Story v. Furman, 25 N. Y. 214, 223.
Walker v. Whitehead, 16 Wall. 314, 317-18.

The legislature may modify, but cannot take away all remedy from a contract.

Bruce v. Schuyler, 4 Gilm. (Ill.) 221, 277.
Wood v. Child, 20 Ill. 209, 211.
Templeton v. Horn, 82 Ill. 491.

In *I Cooley on Taxation*, (3rd Ed.) 128, it is said:

> "The remedy for the enforcement of a contract is a necessary part of it, without which it could have no legal obligation whatever. But there is, and can be, nothing unchangeable in remedies, and the State must be left at liberty to change them at discretion. In the recognition of this right, however, it is always assumed that no change will be made which will leave a party without a remedy, for the enforcement of his contract, substantially equal to and as efficient and valuable as that the law entitled him to claim when his contract was made.

If the remedy is wholly, in some distinct and important part, taken away, or is hampered with conditions or restrictions, or otherwise seriously impaired in value, the obligation of the contract is impaired in this particular."

Von Hoffman v. Quincy, 4 Wall. 535, 550, *et seq.*

Tennessee v. Sneed, 96 U. S. 69, 74.

Poindexter v. Greenhow, 114 U. S. 270, 304.

In *Cooley's Const. Lim., (6th Ed.)*, 350, it is said:

"A law which deprives a party of all legal remedy must necessarily be void. 'If the legislature of any State were to undertake to make a law preventing the legal remedy upon a contract lawfully made and binding on the party to it, there is no question that such legislature would, by such act, exceed its legitimate powers. Such an act must necessarily impair the obligation of a contract, within the meaning of the constitution.'"

Call v. Hagger, 8 Mass. 423, 430.

Osborne v. Nicholson, 13 Wall. 654, 662.

U. S. v. Conway, Hempst. 313.

Johnson v. Bond, *id.* 533.

West v. Sanson, et al., 44 Ga. 295.

Penrose v. Erie Canal Co., 56 Pa. St. 46, 48.

Thompson v. Commonwealth, 81 *id.* 314, 323.

Impairing the validity of a contract includes acts taking away remedies upon contract.

Von Hoffman v. Quincy, 4 Wall. 535, 552.
Antoni v. Greenhow, 107 U. S. 769, 774.
White v. Same, 114 U. S. 307.
Poindexter v. Same, *ib.* 270, 303.
Chaffin v. Taylor, *ib.* 309.
Allen v. B. & O. R. Co., 114 U. S. 311.
Rahway v. Munday, 44 N. J. L. 395, 415.
Morton v. Comptroller Genl., 4 S. C. 430, 449.
Tracy v. Reed, 38 Fed. 69, 75.
Collins v. Collins, 79 Ky. 88, 89.
Seibert v. Lewis, 122 U. S. 284, 294.
Moore v. Greenhow, 114 U. S. 338.

In *Oatman v. Bond*, 15 Wis. 22, the Court, after stating at pp. 28-29 that:

> "It is within the power of the legislature to repeal, change, or modify the laws governing the proceedings in courts of justice, as well as to past as future contracts, so that parties have a substantial remedy, according to the cause of justice at the time the contract was made,"

held the statute there under consideration to be invalid on the express ground that it did not leave the parties any such remedy, but showed

"upon its very face an intention to clog, hamper and embarrass the proceedings to enforce the remedy, so as to destroy it entirely, and thus impair the contract, so far as it is in the power of the legislature to do so."

Adding as a further ground:

"no one would contend in view of the provision in our Bill of Rights, which declares that 'every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character,' that an act taking away *all remedies* for enforcing contracts would be a valid enactment."

In *McCracken v. Hayward*, 2 How. 608, is is said at p. 612:

"The obligation of a contract 'consists in its binding force on the party who makes it.' *This depends on the laws in existence when it was made*, these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them, by one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a

right to enforce the performance, by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

Sturgis v. Crowninshield, *supra*.
Ogden v. Saunders, *supra*.
Robinson v. Magee, 9 Cal. 81, 84.
Smith v. Cleveland, 17 Wis. 573.

In *Scarborough v. Dougan*, 10 Cal. 305, the court said:

"It is just as well settled that the legislature has no right so to regulate the remedy as that it shall destroy the contract by denying all means of enforcement. A right without a remedy is practically no obligation at all. A contract is just as much impaired by a prohibition to sue upon it as it is by direct legislative action declaring it void."

In *Patterson, Federal Restraints on State Action*, (1888), § 77, p. 181:

"The force and effect of the prohibition,"—(against impairing the obligation of contracts)—"as construed by the courts,

is that a state may not, by any law or by any act to which the state, by its enforcement thereof, gives the force of a law, deprive a party of the legal right of enforcing or obtaining compensation for the breach of, an express contract, executed or executory, between individuals, or between a state and individual; but a state may regulate or limit the remedies of the contracting parties, provided it leaves in force a substantial part of the legal remedies which subsisted at the time of making the contract."

15 Am. & Eng. Ency of Law, (2nd Ed.) 1052.

The obligee, though not entitled, as of right, to the same form of remedy as that in force when the obligation was contracted, is entitled to *some remedy;* "and that remedy must be substantially equivalent, in coercive force, to that provided by law when the obligation was contracted."

In addition to the foregoing authorities see the following:

Memphis v. U. S., 97 U. S. 293.
Lockett v. Usry, 28 Ga. 345.
Bruce v. Schuyler, 9 Ill. 221-5.
Fullerton v. U. S. Bank, 1 Peters, 604, 614-15.
Walker v. Whitehead, 16 Wall. 314, 317.

In *15 Am. & Eng. Ency. of Law, (2nd Ed.)*, 1049, it is said:

> "The obligation of the contract implied in the grant of a corporate charter will be impaired by a law passed subsequent to the acceptance of the charter, * * * imposing burdens on the corporation itself as a condition to the further exercise of its corporate rights."

In *Patterson's Federal Restraints on State Action*, 152, 153, it is said:

> "A State cannot, after the making of a contract, impose as a condition precedent to its enforcement, that he who seeks to enforce a contractual right, shall prove an extrinsic and independent fact which has no necessary connection with the right to be enforced; as, for instance, that he has paid certain taxes."

In *Walker v. Whitehead*, 16 Wall. 314, it is expressly *held*, that a retrospective law, depriving a party of his right to enforce a contract when taxes have not been paid, is void.

We beg leave to refer at this point to another phase of this statute, to-wit: That it is retrospective in its operation. It does not confine its attempted denial of the due administration of justice to causes of action in favor of or against appellant which may arise *subsequent to the enactment*, but extends that denial "to any and all actions, suits and proceedings, in law or equity, brought or maintained by or on behalf of such corporation, etc." It therefore closes the doors of the courts of justice to the corporation affected, as well concerning matters of

controversy which originated prior to March 22, 1902, as those which might arise subsequent to that time.

In *State ex rel. Davison v. Gorman*, 40 Minn. 232, the question was upon the constitutionality of a statute which required the payment to the county treasurer of specified sums, prescribed with reference to an arbitrary classification of estates, by their value, and provided that "no proceedings of any kind shall be had in any cause pending in such probate court for the settlement of any estate," * * * "until such payments shall have been made."

In opposition to this statute there was set up a section of the Minnesota constitution which read as follows:

> "(Every person) ought to obtain justice freely and without purchase; completely and without denial, conformably to the laws."

The court cites cases to the effect that "the constitutional right to obtain justice freely and without purchase, which is as ancient as *Magna Charta*, has not been understood to be a right to have judicial proceedings carried on without expense to the parties," (p. 233); but takes the ground that "the sums required by this act to be paid into the county treasurer, must be regarded as *taxes*, in the ordinary sense of that word, as it is used in the constitution;" and then, after discussing the statute as offending also against the constitutional requirement of uniformity in taxation, the opinion closes thus:

> "Suitors in this * * * court, * * * should not be required to pay, as a condition to their suits being entertained, a tax measured by the value of their property, and without regard to the nature or extent of the judicial proceedings which may be invoked or become necessary. That would be contrary to that clause of the Constitution which guarantees justice freely and without purchase, completely and without denial."

That case was followed in *State v. Nelson*, 41 Minn. 25, in *Mearkle v. The County of Hennepin*, 44 Minn. 546, and in *State v. Mann*, 76 Wis. 469, 480. In the last case the court holds of a similar requirement of the Revenue Act that "it looks as if it compelled suitors to *purchase justice*."

Sec. 66 of this Colorado Act is in violation of general constitutional principles.

> "Every man is entitled to a certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice or to submit to conditions not imposed upon his fellows, as a means of obtaining it."
>
> *Cooley Const. Lim. (6 Ed.)* 443, 444.

The case at bar, then, stands in the position and presents the condition following, to-wit:

The State of Colorado, having absolute and arbitrary right and power to either exclude foreign corporations altogether from her boundaries, or to

permit them to do business as corporations therein, affirmatively elected to permit them to do business as corporations therein.

Having so elected to admit foreign corporations into her territory with "the right to do business" therein, she further had the absolute and arbitrary right and power to fix the price, terms and limitations under which the foreign corporations should enjoy the privilege and right to do business as such in the State of Colorado. She required them to file their charter or articles of incorporation and sundry other documents and papers expressly named in the statute; to locate a business office in the State and file a certificate of such location; to appoint an agent in the State; to make filings of these documents, certificates and papers at designated places; to pay certain filing fees; and to pay *a cash* or lump *consideration*, ascertained and fixed by a basis or method of computation expressly and distinctly established by statute: She elected (G. L. 1883, p. 186, sec. 260) that, upon compliance with these requirements, "such corporation shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon such corporations of like character, organized under the general laws of this State, and shall have no other or greater powers."

The conventional price or bonus, which the State demanded and agreed to take from the plaintiff in error, at the time it came into the State and availed itself of this statutory right and privilege "to do business" in the State of Colorado, was the cash or lump sum of $15.000.00 "for the use of the state," *plus* certain filing fees which the law required to be paid to the various filing and recording officers

in whose offices the prescribed papers and documents were required to be filed.

The plaintiff in error fully complied with each and every one of these requirements, and paid in cash the bonus or price demanded and agreed upon by the State. The State of Colorado, by this method, invited, induced and *enticed* the plaintiff in error to come within the State of Colorado and invest five million dollars in real estate; inaugurate and equip a large and extensive business therein as a link in its general business, which was both interstate and international; tie up twenty per cent. of its resources and working capital in said State; and to put itself in such a position that it could not thereafter withdraw from the State without immense loss, both in property and business, and without a disastrous crippling and embarrassment of its enterprise.

As the laws and statutes of Colorado *at that time* stood, the performance by the plaintiff in error of the above requirements, and the payment of the price aforesaid, entitled it to the right to do business in said State as a corporation for the period of twenty years. No provision was made by which the State reserved the power to charge any additional consideration, price or compensation for the right to do business in this State; nor was there anything by which the plaintiff in error was informed or notified that a further or additional price would, *or could*, be demanded of it until the end of that period.

Several years after the State of Colorado had thus invited and enticed the plaintiff in error into this position from which it could not withdraw without great loss and embarrassment, and which put it in a very large degree within the power of the State of

Colorado, said State arbitrarily, and without consulting or obtaining the consent of the plaintiff in error, by the enactment and approval of the statute under consideration, demanded of the plaintiff in error, for the right, *which it had already granted to, and received full payment for from*, the plaintiff in error, an additional price or consideration of $72,000.00, payable in annual installments of $4,000.00 each; and provided that, upon the failure or refusal of the plaintiff in error to pay this new and additional price, it should forfeit and be deprived of the very right which was already vested in it, acquired by full compliance with all the terms and conditions prescribed by the State and the full payment of the agreed price. And not only was an additional price demanded of it, but the price demanded was discriminative against it as compared with Colorado domestic corporations, with which, under the section of the General Laws last above referred to, it was put on an *equal* footing.

In the case at bar, the Colorado court, in the decision here presented for review, and the judgment and decree of the Colorado *nisi prius* court which that decision affirmed, upheld the validity and constitutionality of said statute, and by a solemn judgment and decree deprived the plaintiff in error of the vested right, which it had acquired absolutely under the laws of Colorado existing prior to March 22, 1902.

The human mind can hardly conceive of a more flagrant case of the violation of the prohibitions in the Federal Constitution against "impairing the obligation of contracts," and against a "denial of due process of law," and the deprivation of "the equal protection of the law."

The Colorado Supreme Court, in its decision and judgment under review, attempts, in section 4 of its opinion, (Rec., pp. 58-9, fols. 127-8) to evade the operation and effect of the latter prohibition of the Federal Constitution by saying that, inasmuch as in the present case there was no attempt on the part of the State of Colorado, or its courts, to set up, apply or enforce, *in the present case*, the provisions of section 66 of the Act of March 22, 1902, which made the failure of the plaintiff in error to pay this exaction operate as a forfeiture of its rights to "a day in court" in this case, therefore that question was irrelevant and immaterial; and that no regard should or could be paid to section 66 of said Act in the determination of the present case. We submit that this holding was erroneous. The true test of the constitutionalty of the statute is *not* what has been *actually done*, or is being actually attempted under it, but what *may be done* under it. If these statutory provisions are constitutional and valid, then beyond all question, one immediate and necessary result of them might be, and will be, to deprive the plaintiff in error of its constitutional *right* to "due process of law" and to the "equal protection of the laws." If the statute makes such a result possible, then that statute is unconstitutional and invalid *in toto* and *ab initio;* and it would be contrary to all constitutional law, and to justice and right, to hold that the statute must be permitted to stand as a perpetual menace and danger, like the sword of Damocles, over the plaintiff in error, until such time as some litigant may choose to cut the hair which suspends it. We humbly and earnestly contend that, where

the question of the constitutionality of a statute is directly presented to the court, law, justice and the established rules of procedure require that that question should be considered and determined upon an examination of the statute *as a law*, and not made to depend upon whether or not the particular litigant, who is claiming under the statute, chooses to ignore or waive some incidental provision of that statute, upon which he might, if he chose, insist equally as upon any other provision of said statute.

It will be readily perceived that if, after having contracted with and received full payment from the plaintiff in error, for the "right to do business as a corporation" in the State of Colorado for twenty years, the State of Colorado could, as it attempts to do by the Act under consideration, require the plaintiff in error to pay an additional compensation of $4,000.00 per annum for the remaining (17 or 18) years of the contract term, then the State of Colorado might have fixed that additional price, or may hereafter do so, at any other amount—at $5,000.00, at $50,000.00 or $500,000.00 per annum. Thus it would be possible for the State to inveigle a foreign corporation into its territory, and into its power, with the understanding and contract that the full compensation to be paid for the right to do business was a specified sum, and then, after having made such a contract, and after that contract is fully performed by the incoming foreign corporation, the State might thereafter arbitrarily demand an additional compensation in a sum which would be *prohibitive*. Thus the State would be enabled to put itself in position to commit fraud and spoliation

against a foreign corporation which had accepted its invitation to come into the State: For it could retain the compensation already agreed upon *and received*, without allowing to such corporation the right contracted for, and without performing the terms and conditions of the contract, which are thereunder to be kept and performed by the State.

Equal Protection of the Laws.

Paragraph 1 of the Fourteenth Amendment further provides:

> "Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

We have already pointed out that by the provisions thereof under discussion, the Act of March 22, 1902, denies to the plaintiff in error the equal protection of the laws, by depriving it altogether of "due process of law" and of the due, or any, administration of justice by or before the courts.

There is, however, still another respect in which the statutory provisions, aforesaid, come within the prohibition of the Fourteenth Amendment, to-wit: That the plaintiff in error,—for the sole reason that it is a foreign corporation and notwithstanding the fact that, after a full compliance with the Colorado statutes, it had been admitted to that State upon an equal footing with Colorado domestic corporations,—is charged *double* the amount charged against such domestic corporations for the same right and privilege. The courts have consistently held that such a

violation of the law of *uniformity of taxation* is prohibited by the clause above quoted from the Fourteenth Amendment.

We, however, will not in this brief enter upon the discussion of this proposition, since it is fully elaborated in "Point II" of the brief of our brother Thacher, to which we beg leave to refer for the contention of the plaintiff in error upon this point.

Conclusion.

There were many propositions advanced and questions discussed in the case when before the Colorado Supreme Court, which, as we understand its practice and procedure, will not be considered by this Honorable Court; we therefore refrain from their discussion.

Some of them were in relation to the construction and effect of the provisions of the Colorado Constitution, and questions arising under Colorado statutes or dependent upon Colorado decisions; also whether the exaction made by this statute was a mere exercise of *the ordinary power of taxation*, and if so, what kind of tax it was. The Colorado Supreme Court, as appears by its opinion set forth in the record, took the position that this was not a "property tax," but was an "occupation tax." The plaintiff in error contends that, strickly speaking, this exaction is not a *tax* at all, but is, as the Colorado Supreme Court properly characterizes it in one portion of its opinion, a mere "bonus or conventional price," arbitrarily charged by the State of

Colorado upon foreign corporations for the "right to do business as a corporation" in the State of Colorado.

Plaintiff in error sincerely believes, and therefore contends, that the latter announcement of the Colorado Supreme Court is correct, and that strictly speaking, said statute does not impose *a tax* at all; but plaintiff in error further contended in the Colorado Court, and will so contend here if the question is raised, that if the exaction attempted by this statute is *a tax* at all, then it is a *property tax* and not an "occupation or license tax." If we are correct in this contention, then according to the express announcement of the Colorado Supreme Court itself, the statute cannot be upheld.

To discuss these propositions at this time would be in the nature of anticipating a defense. We, therefore, do not feel at liberty to discuss them until it shall appear later on in the argument whether or not the defendant in error will advance and rely upon such contentions.

We respectfully submit that the Colorado Act of March 22, 1902, is invalid because in violation of the Federal Constitution in each and all of the respects above pointed out, and that the judgment of the Colorado Court in upholding and attempting to enforce said provisions of that Act, is erroneous.

We, therefore, humbly pray that the judgment and decree of the Colorado Supreme Court may be reversed and the Act aforesaid declared to be unconstitutional and invalid *quoad* Sections 65 and 66 thereof.

For the convenience of the court, we subjoin

hereto an Appendix setting out such portions of the Colorado statute as we think probable the court may wish to refer to incidentally during the consideration of this case.

Respectfully submitted,

JOEL F. VAILE,

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Solicitors of Plaintiff in Error.

WM. W. FIELD,

Of Counsel.

APPENDIX.

EXCERPTS FROM THE COLORADO STATUTES RELATIVE TO CORPORATIONS:

Mills Annotated Statutes:

Sec. 476. "Corporations formed under this act shall be bodies corporate and politic in fact and in name, by the name stated in such certificate, and by that name have succession for the period for which they are organized; may in any court of law or equity in this State sue and be sued, may have a common seal, which they may alter or renew at pleasure, by filing an impression of the same in the office of the secretary of state; may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, whether acquired by purchase, grant, devise, gift or otherwise and may, from time to time, sell and dispose of the same or any part thereof when not required for the use of the corporation. They may borrow money and pledge their franchises and property both real and personal to secure the payment thereof; and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed, as named in their certificate of incorporation."

* * * * * *

Sec. 499. "Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation duly acknowledged with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. * * *"

* * * * * *

Sec. 500. "Every company incorporated under the laws of any foreign State or kingdom or of any State or Territory of the United States, beyond the limits of this State, and now or hereafter doing business within this State, shall file in the office of the secretary of State a copy of their charter of incorporation; or in case such company is incorporated by certificate under any general incorporation law, a copy of such certificate and of such general incorporation law duly certified and authenticated by the proper

authority of such foreign State, Kingdom or Territory."

* * * * * *

Sec. 503. "Suits may be instituted and prosecuted by and against any corporation formed or recognized (organized) under this act, in the same manner and in like cases as natural persons."

Colo. Session Laws, 1897, Chapter 51, p. 157:

"Section 1. Every corporation, joint-stock company or association incorporated by or under any general or special law of this State, or by or under any general or special law of any foreign State or Kingdom, or of any State or Territory of the United States beyond the limits of this State, having capital stock divided into shares, shall pay to the Secretary of State for the use of the State, a fee of ten dollars in case the capital stock which said corporation, joint-stock company or association, is authorized to have, does not exceed fifty thousand dollars; but, in case the capital stock thereof is in excess of fifty thousand dollars, the Secretary of State shall collect the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of cer-

tificate of incorporation, articles of association, or charter of said incorporation, joint-stock company or association, in the office of the Secretary of State; and no such corporation, joint-stock company or association shall have or exercise any corporate powers or be permitted to do any business in this State until the said fee shall have been paid; and the Secretary of State shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to any such corporation, joint-stock company or association, until said fee shall have been paid to him. But this act shall not apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

"Section 2. Any foreign corporation doing business in this State, that has, since the filing or its certificate in this State, increased its capital stock, without paying the fees prescribed by the law of this State at the time of such increase, or that shall hereafter increase its capital stock, shall be liable to pay the fees prescribed by this Act, and it is hereby made the duty of the Secretary of State to at once cause action to be brought against any foreign corporation for recovery of such fees, and a certified copy of the certificate of such increase, on file in any foreign State, shall be sufficient evidence to sustain a judgment for the amount of

such fees and an action in the nature of a writ of quo warranto shall lie against any foreign corporation to test its right to exercise corporate franchises in this State."

Colo. Session Laws, 1901, Chapter 52, p. 121:

"Sec. 10. No corporation, joint-stock company or association, incorporated by or under any general or special law of this State, or by or under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation, joint-stock company or association, of all fees and taxes prescribed by law to be paid to the secretary of state, and every such corporation, joint-stock company or association shall pay to the secretary of state for each such certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

Colo. Session Laws, 1902, Chapter 3; (The Act of March 22, 1902):

"Sec. 2. All taxable property shall be listed and valued each year and shall be assessed at its full cash value.

* * * * * *

"Sec. 13. Whenever the terms mentioned in this section are employed in this Act, they are employed in the sense hereinafter affixed to them.

"The term 'real estate' includes first all lands or interest in lands within the State, etc.

"The term 'improvements' includes all buildings, water rights, structures, fixtures and fences erected upon or affixed to lands, whether the title has been acquired to said land or not.

"The term 'personal property' includes everything which is the subject of ownership, whether tangible or intangible, and not included within the term 'real estate.'

"The term 'credit' includes every claim or demand for money, labor or other valuable thing and every annuity or sum of money receivable at stated periods, etc.

"The term 'intangible property' shall include rights and credits, franchises, special privileges and special advantages attendant upon or derivable under contract rights, having a value for the purposes of income or sale of itself or in connection with other property.

"Sec. 14. Except where otherwise herein provided, the phrase 'taxable property,' as used in this Act, includes real property, personal property, property that savors of both real and personal, property rights and credits and all intangible property as defined in the preceding section, etc.

"Sec. 15. All property, not expressly exempted by law, shall be subject to taxation. The term 'taxation' as herein used shall be held to include both tangible and intangible property.

* * * * * *

"Sec. 60. * * * Except as herein otherwise provided, in determining the value of taxable property in this state of corporations, foreign and domestic, the value of the capital stock and bonds of each corporation shall be received and considered and shall be competent evidence of the value of the entire plant of such corporation, but any and all other evidence of the full and true cash value of said property, both tangible and intangible, shall be received and considered in arriving at the value of the entire plant of such corporation.

"Sec. 61. In arriving at the value of the property owned by any corporation, foreign or domestic, not only its tangible property, whether it be within the state or partly within and partly without this state, shall be looked to by the assessor and state board of equalization, but its intangible property such as special privileges, rights of way, fran-

chises, contract rights and obligations, shall be considered, etc.

* * * * * *

"Sec. 63. Every corporation doing business in two or more counties of the state shall, etc."

(The appellant is such a corporation.)

"The tax upon the intangible property of every such corporation shall be a lien upon the tangible property of such corporation wherever situate, and if any such tax is not paid when the same ought to be paid, the treasurer of the county where occurs the failure to pay such tax shall collect the said tax in the same manner and with like effect as if the same were delinquent taxes against tangible property.

* * * * * *

"Sec. 130. All taxes, levied or assessed upon personal property of any kind whatsoever, shall be and remain a perpetual lien upon the property so levied upon until the whole amount of such tax is paid."